Yeoh Kee Aun v PI Capital Asset Management Sdn Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO D5–24–140 OF 1996
STEVE SHIM J
9 FEBRUARY 2000

Civil Procedure *— Affidavits — Striking out (part of) — Proper time to object admissibility of allegations in affidavit would be at hearing of application — Whether application to strike out premature — Whether passages sought to be expunged were irrelevant and/or scandalous*

Civil Procedure *— Parties — Intervention — Setting aside of ex parte order — Respondent's legal interest affected by ex parte order — No full and frank disclosure of material facts at time of granting of ex parte order — Whether respondent should be allowed to intervene and ex parte order set aside*

The respondents applied for leave to intervene and to set aside the ex parte order dated 14 May 1996 (encl 7). The respondents contended that they were aggrieved by the ex parte order because their legal rights and interests have been adversely affected in the following respect: (i) that they were investigated for copyright violation by the Ministry of Domestic Trade and Consumers Affairs following a complaint lodged by the applicant apparently based on the ex parte order as a result of which certain items were seized; and (ii) the respondents were also users of various specialized computer software for the purposes of creating a collocation of data like the 'Keydata Services' allegedly owned by the applicant which would expose them to the prohibitive or injunctive effect of the ex parte order thereby causing or likely to cause serious damage or loss to their businesses. It was further submitted that the ex parte order ought to be set aside on the grounds that there were misrepresentation and no full and frank disclosure. The applicant applied to strike out certain parts of the affidavit filed by the respondents (encl 16) on the ground that they were irrelevant and scandalous.

Held:

(1) The thrust of the applicant's application (encl 16) was to deny the admissibility of those portions of the affidavit for the purpose of considering the respondents' application (encl 7) which, if successful, would have the obvious effect of causing encl 7 to fall. Given the seriousness and gravity of the effects, the proper time for objecting to their admissibility would be when the respondents' application came up for hearing. The applicant's application was premature and therefore should be dismissed (see p 512B–D).

(2) In any event, even if the application is heard on the merits, the court found that the passages sought to be expunged were not

irrelevant and/or scandalous having regard to the evidence as disclosed in the affidavits and when they were examined in the context of the prayers sought for by the respondents. In the circumstances, the court found no merit in encl 16 and on that score it should be dismissed also (see p 512E–F).

(3) Based on the facts and circumstances of the case, the court found that the legal interests of the respondents had been affected by the ex parte order. The court accepted that the circumstances highlighted by the respondent in (i) and (ii) had shown sufficiently and effectively the extent their legal interests had been affected by the ex parte order. In the premises, the court found merit in the respondents' application to intervene (see p 513F–G).

(4) When the affidavit evidence was examined in totality, the court was not satisfied that the applicant had shown that he had full and complete ownership of the copyright to 'Keydata Services' at the material time. In the circumstances, the court found there was substance in the stand taken by the respondents that the applicant had misrepresented and/or failed to make full and frank disclosure of all material facts in respect of the ownership to 'Keydata Services' at the time the ex parte application was heard resulting in the granting of the ex parte order. Such material facts were sufficiently severe that if they were disclosed at the proper time, it was more than likely that the ex parte order would not have been granted. In the premises, the court found it fit and proper to set aside the ex parte order (see p 516A, D–E).

[Bahasa Malaysia summary

Responden-responden telah memohon kebenaran untuk mencelah dan mengetepikan perintah ex parte bertarikh 14 Mei 1996 (lampiran 7). Responden-responden menegaskan bahawa mereka terkilan dengan perintah ex parte tersebut kerana hak undang-undang dan kepentingan mereka telah dijejaskan dengan teruk dari segi: (i) mereka telah disiasat untuk pelanggaran hak cipta oleh Kementerian Hal Ehwal Pengguna dan Perdagangan Tempatan berikutan aduan yang dibuat oleh pemohon yang jelas berdasarkan perintah ex parte tersebut di mana telah mengakibatkan beberapa barang telah dirampas; dan (ii) responden-responden adalah pengguna pelbagai perisian komputer yang khusus bagi tujuan mewujudkan kolokasi data seperti 'Keydata Services'yang dikatakan milik pemohon yang akan mendedahkan mereka kepada kesan menghalang dan injunksi perintah ex parte tersebut dan menyebabkan atau kemungkinan besar menyebabkan kerosakan atau kerugian yang serius kepada perniagaan-perniagaan mereka. Dihujahkan selanjutnya bahawa perintah ex parte patut diketepikan atas alasan-alasan bahawa terdapat salah nyata dan tiada pendedahan yang penuh dan ikhlas. Pemohon memohon untuk membatalkan beberapa bahagian afidavit

yang difailkan oleh responden-responden (lampiran 16) atas alasan ia adalah tidak relevan dan memalukan. A

Diputuskan:

(1) Teras permohonan pemohon (lampiran 16) adalah untuk menafikan kebolehterimaan bahagian-bahagian afidavit bagi tujuan mempertimbangkan permohonan responden (lampiran 7) di mana, jika berjaya, mempunyai kesan yang jelas menyebabkan lampiran 7 untuk gagal. Oleh kerana kesan-kesan yang mendalam dan serius, masa yang sesuai untuk membantah kebolehterimaan adalah apabila permohonan responden bangkit untuk perbicaraan. Permohonan pemohon adalah pramasa dan patut ditolak (lihat ms 512B–D). B C

(2) Walau apa sekalipun, jika permohonan tersebut didengar atas merit pun, mahkamah mendapati bahagian yang patut dipohon untuk dikeluarkan bukanlah tidak relevan dan/atau memalukan memandangkan keterangan yang didedahkan di dalam afidavit-afidavit dan apabila ia dinilai di dalam konteks perintah-perintah yang dipohon oleh responden-responden. Di dalam keadaan-keadaan berikut, mahkamah mendapati tiada merit di dalam lampiran 16 dan dengan itu ia patut ditolak juga (lihat ms 512E–F). D E

(3) Berdasarkan fakta dan keadaan-keadaan kes, mahkamah mendapati kepentingan sah responden telah dijejaskan oleh permohonan ex parte tersebut. Mahkamah menerima keadaan-keadaan yang ditunjukkan oleh responden di dalam (i) dan (ii) menunjukkan dengan cukup dan berkesan akan takat kepentingan sah mereka telah dijejaskan oleh permohonan ex parte tersebut. Atas premis tersebut, mahkamah mendapati bahawa ada merit di dalam permohonan responden untuk mencelah (lihat ms 513F–G). F

(4) Apabila keterangan afidavit dinilai secara keseluruhan, mahkamah tidak berpuas hati bahawa pemohon telah menunjukkan bahawa beliau mempunyai milikan penuh hak cipta kepada 'Keydata Services' pada masa matan tersebut. Di dalam keadaan-keadaan tersebut, mahkamah mendapati tiada dasar di dalam pendirian yang diambil oleh responden-responden bahawa pemohon telah membuat salah nyata dan/atau gagal untuk membuat pendedahan yang penuh dan ikhlas akan semua fakta material berkenaan dengan milikan 'Keydata Services' pada masa permohonan ex parte didengar menyebabkan pemberian perintah ex parte tersebut. Fakta-fakta material tersebut cukup mendalam sehingga jika ia didedahkan di masa yang sesuai, kemungkinan besar bahawa perintah ex parte tersebut tidak akan diberikan. Atas premis tersebut, mahkamah mendapati adalah wajar dan sesuai untuk mengetepikan perintah ex parte tersebut (lihat ms 516A, D–E).] G H I

A **Notes**

For cases on striking out of affidavits, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 289–292.

For cases on intervention generally, see 2(2) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 3278–3295.

B **Cases referred to**

Creative Furnishing Sdn Bhd v Wong Koi @ Wong Khoon Foh t/a Syarikat Sri Jaya [1989] 2 CLJ 93 (refd)

J (An Infant), Re [1960] 1 WLR 253 (refd)

C *Jessop (A Solicitor), Re* [1910] WN 128 (refd)

King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington, The; ex p Princess Edmond de Poliguac [1917] 1 KB 486 (refd)

Tohtonku Sdn Bhd v Superace (M) Sdn Bhd [1992] 2 MLJ 63 (refd)

D **Legislation referred to**

Rules of the High Court 1980 O 41 r 6

Alina Alias (*Wong Lu Peen & Tunku Alina*) for the applicant.
PC Kok (*Shearn Delamore & Co*) for the respondent.

E **Steve Shim J**: There are two applications before me, one by the proposed interveners ('the respondents') at encl 7 seeking inter alia leave to intervene and to set aside the ex parte order dated 14 May 1996 (encl 4) and the other by one Yeoh Kee Aun ('the applicant') at encl 16 to strike out certain parts of the affidavit filed by the respondents at encl 6.

F In view of the nature of the reliefs sought for in encl 16 in juxtaposition to those in encl 7, I think it proper to deal with encl 16 first. As I have said, encl 16 is the applicant's application to strike out certain portions of an affidavit affirmed by Tam Kut Hing at encl 6 pursuant to O 41 r 6 of the Rules of the High Court 1980 ('the RHC') essentially on the ground that they are irrelevant and scandalous. In opposing the said application, the G respondents through their counsel, have raised what appears to be a preliminary issue, contending that the said application is premature and should therefore be dismissed. According to counsel, the application is unnecessary for the purpose of enabling the summons at encl 7 to be properly heard, relying, it seems, on the authority of *Re Jessop (A Solicitor)* H [1910] WN 128 in which there was an application to strike out certain parts of an affidavit as being embarrassing, vexatious and oppressive. The application was dismissed by the High Court. On appeal to the Court of Appeal, Lord Cozens-Hardy MR, in dismissing the appeal, had occasion to say as follows:

I > ... the proper time for objecting that they were inadmissible in evidence was when the summons came on for hearing when all the facts were before the court. It would be a very bad example to decide the question of admissibility at this preliminary stage.

Counsel also relies on the authority of *Re J (An Infant)* [1960] 1 WLR 253 when the Chancery Division of the High Court was faced with an application to strike out various passages in an affidavit as being scandalous, irrelevant and argumentative or otherwise oppressive. The court dismissed the application on the ground that it was premature. In the course of decision, Gross J stated, inter alia:

> ... I can properly refuse to strike out any of the passages to which objection is taken by the father if I consider that that course is not necessary for the purpose of enabling the mother's summons to be properly heard.

Quite clearly, the thrust of the applicant's application at encl 16 is to deny the admissibility of those portions of the said affidavit (encl 6) for the purpose of considering the respondents' application at encl 7 which, if successful, would have the obvious effect of causing encl 7 to fall like a house of cards thereby leading to its inevitable demise. Given the seriousness and gravity of the effects as I have indicated, I am of the firm view that if the applicant considers those portions aforesaid to be scandalous and irrelevant, the proper time for objecting to their admissibility would be when the respondents' application at encl 7 came up for hearing. In this respect, I am in total agreement with the observation of Lord Cozens-Hardy MR in *Re Jessop* when he said that it would be a very bad example to decide the question of admissibility at this preliminary stage.

In the instant case, having regard to the factual circumstances and for the reasons stated, I am inclined to agree with the respondents' contention that the application at encl 16 is premature. I will therefore dismiss it with cost accordingly.

In any event, even if the said application is heard on the merits, I have no difficulty in coming to the conclusion that the passages sought to be expunged are not irrelevant and/or scandalous having regard to the evidence as disclosed in the affidavits filed herein and when they are examined in the context of the prayers sought for by the respondents in their application at encl 7. In the circumstances, I can find no merit in encl 16 and on that score, it should also be dismissed.

I come now to the application at encl 7 taken out by the respondents seeking reliefs which turn essentially on the need to intervene and to set aside the ex parte order dated 14 May 1996 at encl 4 granted to the applicant. The application is supported by the affidavit of Tam Kut Hing at encl 6.

Let me begin with the request for leave to intervene. Here, it is contended by the respondents that they are aggrieved by the ex parte order dated 14 May 1996 because their legal rights and interests have been adversely affected in the following respects: (a) that they are being investigated for copyright violation by the Ministry of Domestic Trade and Consumer Affairs following a complaint lodged by the applicant apparently based on the said ex parte order as a result of which certain items were seized, etc; and (b) that the respondents are also users of various specialized computer software including Metastock software for the purposes of creating a collocation of data like the 'Keydata Services' allegedly owned by

A the applicant which would expose them to the prohibitive or injunctive effect or effects of the ex parte order thereby causing or likely to cause serious damage or loss to their businesses, etc. It is further contended that by virtue of the said ex parte order, anyone found to have a similar data collocation like 'Keydata Services' containing solely of daily KLSE share prices might be considered to have infringed the applicant's copyright which B would conceivably attract both civil and criminal liabilities under the Copyright Act.

In response to (a) above, counsel for the applicant submits in effect that the investigation by the Ministry was not based on the ex parte order but on the statutory declaration or affidavit made by the complainant and that the C said ex parte order, on its own, has no penal effect unlike a trade description order and hence there is no basis for the respondents to allege a legal right on the ground that they were being investigated by the enforcement authorities. And in reply to (b) above, counsel simply maintains that only commercial interests are involved and as such the respondents have not provided any legal basis to be included as a party to the proceedings.

D At this point, it may be pertinent to take stock of the applicable law which has been firmly restated by the Supreme Court in *Tohtonku Sdn Bhd v Superace (M) Sdn Bhd* [1992] 2 MLJ 63 wherein Mohd bin Yusoff SCJ said, inter alia, at p 65:

> E It is settled law, on the authorities, that a party may be added if his 'legal interests' will be affected by the judgement in the action ... In that case, the Privy Council (*Regang Mining Co Ltd v Choong San & Ors* [1969] 2 MLJ 52 at pp 55–56) had formulated the test to determine whether a party's interests in the matter, are 'legal' ... in the following words:
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> > 'A better way of expressing the test is: will his rights against or F liabilities to any party to the action in respect of the subject matter of the action be directly affected by any order which may be made in this action?'

Applying the above test to the facts and circumstances of the instant case, I have no difficulty in holding that the legal interests of the respondents have been affected by the ex parte order dated 14 May 1996. I accept that the G circumstances highlighted by counsel for the respondents in (a) and (b) above have shown sufficiently and effectively the extent their legal interests have been affected by the said ex parte order and it is quite conceivable that such effects will continue as long as the said ex parte order subsist. In the premises, I find merit in the respondents' application to intervene. In my view, they ought to be given the opportunity of being heard. Leave to H intervene is therefore allowed.

This brings me to the more fundamental relief sought by the respondents which is an order to set aside the ex parte order dated 14 May 1996. Here, they have advanced a host of reasons but it is sufficient, I think, to deal with the more significant ones namely: (a) that there was I misrepresentation; and (b) that there was no full and frank disclosure. These reasons are obviously canvassed in the light of the principles laid down by the Supreme Court in *Creative Furnishing Sdn Bhd v Wong Koi @*

Wong Khoon Foh t/a Syarikat Sri Jaya [1989] 2 CLJ 93 where it was held, inter alia, at p 96:

> Further, in presenting affidavit evidence ... for an exparte order ... it is incumbent on the applicant to make full and frank disclosures of all material facts. Every material representation must not be misleading, and there must not be any suppression of material facts. Failure to do so at the crucial time of making the ex parte application would invariably be fatal ...

This is obviously a restatement of what was stated by Warrington CJ in *The King v The General Commissioners for the Purposes of the Income Tax Acts for the District of Kensington; ex parte Princess Edmond de Poliguac* [1917] 1 KB 486 when he said, inter alia, at p 509:

> It is perfectly well settled that a person who makes an ex parte application to the court — that is to say, in the absence of the person who will be affected by that which the court is asked to do — is under an obligation to the court to make the fullest possible disclosure of all material facts within his knowledge, and if he does not make that fullest possible disclosure, then he cannot obtain any advantage from the proceedings, and he will be deprived of any advantage he may have already obtained by means of the order which has thus wrongly been obtained by him. That is perfectly plain and requires no authority to justify it.

Clearly, on the authorities, where there is a failure to disclose material facts within his knowledge in an ex parte application by a party or where there is any material misrepresentation, it will result in the court setting aside the ex parte order obtained.

As I have said, the respondents have alleged that there was misrepresentation as well as deliberate non-disclosure of a material fact relating to the true ownership of the alleged copyright to 'Keydata Services'. More specifically, they contend that the applicant had misled the court that he was the owner of 'Keydata Services' when in fact he was not. They further contend that the applicant had failed to disclose that two other companies, ie Key Quotes International of Singapore and Key Quotes Services Sdn Bhd had also claimed ownership to 'Keydata Services'. This is clearly reflected in paras 43, 44, 45 and 47 of the supporting affidavit at encl 6 which I shall, for purposes of emphasis and clearer insight reproduce herein:

> 43 Further, the applicant has misrepresented to the court that he is the owner of the 'Keydata Services' data collocation. The applicant in bad faith, deliberately and intend to conceal or suppress from the court that other persons are the true owners of 'Keydata Services'. The applicant in bad faith and deliberately failed to disclose the fact, that he was not the owner of 'Keydata Services'.
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> 44 Further, based on the above para 43, I was formerly a distribution agent of a Singapore business namely Key Quotes International and later to a local company named Key Quotes Services Sdn Bhd. In any agency with Key Quotes International and Key Quotes Services Sdn Bhd, the said both companies clearly stated that they were the legal owners of the data collocation 'Keydata Services'. Therefore, it is clear and obvious that the applicant is not the true owner of 'Keydata Services' as asserted. Now

produced before me and annexed herein as exh TKH-8 are copies of the service agreement forms for and on behalf of Key Quotes International and Key Quotes Services Sdn Bhd with other persons which I as an agent formerly obtained for Key Quotes International and Key Quotes Services Sdn Bhd. The applicant himself has admitted in exh TKH-8 that 'Keydata Services' is owned by Key Quotes International and Key Quotes Services Sdn Bhd and not himself.

45 It is clear and obvious from exht TKH-8 that the applicant has made a false declaration and misrepresented to the court at the time of applying the said Order that he was the owner of 'Keydata Services'. The applicant himself signed the said service agreements on behalf of Key Quotes International at Key Quotes Services Sdn Bhd.

46 Based on the above paragraphs and exh TKH-1 the applicant admitted that he was only the agent or an employee on behalf of Key Quotes Services. Therefore, 'Keydata Services', if exist is owned by Key Quotes Services Sdn Bhd and not the applicant himself.

These allegations, although in parts disputed by the applicant, have nevertheless demonstrated the point that the issue of ownership was not as settled as the applicant had led the court to believe at the time of the hearing of the ex parte application at encl 2.

Be that as it may, the applicant has, in his affidavit in reply at encl 21, explained in some detail, the formation of companies such as Key Computers Pte Ltd, Key Quotes International and Key Quotes Services Sdn Bhd and his roles in these companies. He has also taken pains to describe graphically how, with his expertise and experience, he was able to develop and create his own database known as 'Keydata Services'. In reiterating the stand taken by the applicant, his counsel submits that although the service agreements marked as exh TKH-8 did suggest Key Quotes International's ownership of copyright in 'Keydata Services' to the world at large, this, according to him, was done by consent of the applicants. He further states that the applicant, Key Computers Pte Ltd and Key Quotes International were one and that the applicant had found this mechanism to be the most expeditious way of doing business. As such, so he argues, Key Computers Pte Ltd or Key Quotes International was not a material fact to the ex parte application at encl 2.

Let me say that having read and considered the affidavit at encl 21 against the other affidavits filed herein, I am not entirely clear on the issue of ownership of the copyright in 'Keydata Services'. There is some confusion between 'authorship' and 'ownership' of the database concerned. This confusion is further exacerbated or accentuated by a remark made by counsel for the applicant when he said this: 'In copyright, only a human being can be an author. Who else was the one human being behind Key Computers Pte Ltd and Key Quotes International but the applicant?' It seems that he has placed undue emphasis on 'authorship' rather than 'ownership' but those are quite clearly two different concepts under the Copyright Act. A person can be an author of a copyright work and yet does not own it. This is evident from s 26 Copyright Act which states that an employee who is the author of a copyright is not the owner of the copyright

if the subject copyright is made in the course of the author's employment or pursuant to a commission. A

In the instant case, when the affidavit evidence is examined in totality, I am not satisfied that the applicant has shown that he had full and complete ownership of the copyright to 'Keydata Services' at the material time. It is perhaps significant to note here that when exh TKH-1 is read with para 10 of the statement of defence filed by the applicant in a Suit No D1–22–3266–1995 (now S5–23–40–96 (brought by the second respondent)), the applicant appeared to have admitted, with apparent ease and deliberation, that 'Keydata Services' was owned by Key Quotes Services Sdn Bhd. The utterance by counsel for the applicant that the applicant had either full and complete control of Key Quotes Services Sdn Bhd or had consented to allow Key Quotes Services and Key Quotes International to claim ownership is but a mere 'shot in the dark', quite unsupported by affidavit evidence. B C

In the circumstances, I have to agree that there is substance in the stand taken by the respondents that the applicant had misrepresented and/or failed to make full and frank disclosure of all material facts in respect of the ownership to 'Keydata Services' at the time the ex parte application at encl 2 was heard resulting in the granting of the ex parte order at encl 4. In my view, such material facts are sufficiently severe that if they were disclosed at the proper time, it is more than likely that the ex parte order in terms of encl 4 would not have been granted. In the premises, I think it fit and proper to set aside the said ex parte order. D E

Now, the respondents have in their application at encl 7 also prayed for a declaration that there is no copyright to the applicant's database known as 'Keydata Services' or alternatively, if the said database is copyrightable, a declaration that the copyright does not belong to the applicant. To the extent in which I have dealt with the other prayers in the application, I do not propose to deal with these declaration prayers at this stage. F

As regards the claim for damages to be assessed by the Registrar, I will allow it for the simple reason that the respondents would have suffered losses and inconvenience as a result of actions taken by the Ministry of Domestic Trade and Consumer Affairs. It has been alleged that the seizures by the officials of the said Ministry were made consequent upon a criminal complaint based on the ex parte order dated 14 May 1996. This is reflected in paras 14, 56 and 57 of the affidavit at encl 6 filed by the respondents which appear not to have been disputed specifically by the applicant in his affidavit in reply at encl 21. G

In summary therefore, I will allow the application at encl 7 and order in terms of prayers (i), (ii) and (v) thereof. I will also award cost of this application to the respondents. H

Order accordingly.

Reported by Jafisah Jaafar I